Supreme Court, U.S.
FILED

0 2 1 5 3 2 APR 14 2003

NO. 02-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS D. SCHNEIDER
SUITE 1801
1515 MARKET STREET
PHILADELPHIA, PA 19102
(215) 241-9900

JOSEPH M. FIORAVANTI
Counsel of Record
217 NORTH MONROE ST.
MEDIA, PA 19063
(610) 892-7370

62 pp

QUESTIONS PRESENTED

Petitioner, formerly a respected senior partner in a national law firm, was wrongly convicted of federal mail and wire fraud, sentenced to fifteen years imprisonment, and ordered to forfeit substantially all his assets. This Court construed those fraud as excluding the factual conduct for which he was convicted, mirroring the construction advocated in his erroneously denied pretrial motion to dismiss the indictment for failure to state an offense. That error and new evidence revealing the government failed to produce exculpatory and impeachment evidence while allowing false testimony to go uncorrected, underlie his claim of factual and legal innocence and require a new trial. Accordingly, the questions presented are:

1. Whether the Court's post-trial construction of the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343) as not encompassing the specific factual conduct charged retroactively deprives the trial court of subject matter jurisdiction to proceed to a trial on the merits?

2. Whether an indictment states the offense of mail or wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 when the party to whom the charged fraudulent misrepresentation was addressed is not the same party as the one from whom money or property is allegedly obtained, a question that continues to divide the courts of appeals?

3. Whether a new trial is warranted when the government fails to disclose exculpatory evidence to its own witnesses, causing state officials in post-trial proceedings to recant their trial testimony, declare the factual conduct alleged in the indictment did not violate state law as charged, and furnish new exculpatory evidence previously provided the government but not to the defense?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. DISTRICT COURTS SHOULD BE HELD TO LACK SUBJECT MATTER JURISDICTION TO PROCEED TO TRIAL ON THE MERITS WHEN THE FACTUAL CONDUCT CHARGED IN THE INDICTMENT FAILS TO STATE AN OFFENSE 8

A. A District Court Lacks Subject Matter Jurisdiction To Proceed When Decisions Of This Court Preclude The Charged Factual Conduct From Constituting An Offense 9

B. The Court's Post-trial Decisions in *Cleveland* and *Neder* Construed the Mail and Wire Fraud Statutes as Not Encompassing the Specific Factual Conduct Charged 12

1. The Court's unanimous opinion in *Cleveland* held that state regulatory licenses are not property for purposes of federal fraud statutes 13

2. The Court's unanimous opinion in *Neder* recognizing materiality as an element of mail and wire fraud precludes criminal liability for "indirect" consequences of mailings and wires 14

3. Use of the limitless phrase "directly and indirectly" in Petitioner's indictment produced a result antithetical to *Cleveland*. 17

II. THE COURTS OF APPEALS REMAIN DEEPLY DIVIDED OVER WHETHER THE PARTY DECEIVED MUST ALSO BE THE VICTIM TO STATE THE OFFENSE OF MAIL OR WIRE FRAUD 18

III. A NEW TRIAL IS WARRANTED WHEN THE GOVERNMENT FAILS TO DISCLOSE RELEVANT EXCULPATORY EVIDENCE TO ITS OWN EXPERT WITNESSES, CAUSING THEM TO TESTIFY FALSELY 21

A. The government failed to disclose evidence to its expert that would have defeated his insolvency theory 23

B. Federal courts should defer to a state insurance department's interpretation of its own administrative regime 25

CONCLUSION 28

APPENDIX 1a

Opinion of the Court of Appeals dated January 13, 2003 affirming the denial of Petitioner's motion for new trial pursuant to Federal Rule of Criminal Procedure 33 based on newly discovered evidence and dismissing related forfeiture and restitution claims 1a

Order of the Court of Appeals dated August 29, 2002 denying Petitioner's request for certificate of appealability 4a

Order of the Court of Appeals dated November 6, 2002 denying Petitioner's request for rehearing or *en banc* reconsideration of its order denying a certificate of appealability 5a

Opinion and Order of the District Court dated June 20, 2001 denying Petitioner's motion to correct its prior orders as to forfeitures, fines and restitution 6a

Order of the District Court dated June 8, 2001 denying Petitioner's motion for new trial under Federal Rule of Criminal Procedure 33 ..... 11a

Order of the District Court dated October 23, 1997 denying Petitioner's motion to dismiss indictment under Federal Rule of Criminal Procedure 12(b)(2) 13a

Text of Pertinent Constitutional and Statutory Provisions 20a

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland, 373 U.S. 83 (1963) 22
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 26
Cleary v. Waldman, 167 F.3d 801 (3rd Cir. 1999) 26
Cleveland v. United States,
531 U.S. 12 (2000) 7, 11, 13, 15, 16, 17, 18, 19, 21
Cohen v. P.U.C., 494 A.2d 58 (Pa. Cmwlth. 1985) 26
Community for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 14
Davis v. United States, 417 U.S. 333 (1974) 11
Durland v. United States, 161 U.S. 306 (1896) 14
Ex Parte Bain, 121 U.S. 1 (1887) 8
Fasulo v. United States, 272 U.S. 620 (1926) 11
Field v. Mans, 516 US 59 (1995) 20
Fiore v. White, 531 U.S. 225 (2001) 11, 12
Giglio v. United States, 405 U.S. 150 (1972) 22, 23, 24-25
Humana, Inc. v. Forsyth, 525 U.S. 229 (1999) 26
In Re Winship, 397 U.S. 358, 364 (1970) 11
Jones v. United States, 529 U.S. 848 (2000) 13, 18
Kaiser v. Stewart, 1997 WL 476455 (E.D.Pa. 1997) 16
Kann v. United States, 323 U.S. 88 (1944) 16
Kungys v. United States, 485 U.S. 759 (1988) 15
McNally v. United States, 483 U.S. 350 (1987) 15
Mesarosh v. United States, 352 U.S. 1 (1956) 28
Monterrey Plaza Hotel v. Local 483,
215 F.3d 923 (9th Cir. 2000) 18
Mooney v. Holohan, 294 U.S. 103, 112 (1935) 25
Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) 14
Napue v. Illinois, 360 U.S. 264 (1959) 22, 25
Oneida Indian Nation of N.Y. v. County of Oneida,
414 U.S. 661 (1974) 10
Rewis v. United States, 401 U.S. 808 (1971) 15
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 10
Russell v. United States, 369 U.S. 749 (1962) 10

Scheidler v. Nat. Org. for Women, Inc., 537 U.S. – (2003) 15
Schmuck v. United States, 489 U.S. 705 (1989) 16
SEC v. National Securities Inc., 393 U.S. 453 (1960) 26
Steel Co. v. Citizens for Better Environment,
523 U.S. 83 (1998) 9, 10
United States v. Agurs, 427 U.S. 97 (1976) 22
United States v. Bagley, 473 U.S. 667 (1985) 22
United States v. Bass, 404 U.S. 336 (1971) 18
United States v. Blumeyer, 114 F.3d 758 (8th Cir.),
cert. denied, 522 U.S. 938 (1997) 19
United States v. Christopher, 142 F.3d 46 (1st Cir.),
cert. denied, 525 U.S. 1054 (1998) 19
United States v. Cotton, – U.S. –, 122 S.Ct. 1781 (2002) 8, 9
United States v. Cosentino, 869 F.2d 301 (7th Cir.),
cert. denied, 492 U.S. 908 (1989) 19
United States v. DeSantis, 134 F.3d 760 (6th Cir. 1998) 18
United States v. Evans, 844 F.2d 36 (2d Cir. 1988) 19
United States v. Gaudin, 515 U.S. 506 (1995) 15
United States v. Guadagna, 183 F.2d 122 (2d Cir. 1999) 18
United States v. Lew, 875 F.2d 219, 221 (9th Cir. 1989) 18-19
United States v. Longoria, 259 F.3d 363 (5th Cir. 2001) 11
United States v. Martinez, 905 F.2d 709 (3rd Cir.),
cert. denied, 498 U.S. 1017 (1990) 5, 9, 17
United States v. Maze, 414 U.S. 395 (1974) 16
United States v. Meacham, 626 F.2d 503 (5th Cir. 1980) 12
United States v. Neder,
527 U.S. 1 (1999) 6, 13, 14, 15, 17, 19, 20, 21
United States v. Peter, 310 F.3d 709 (11th Cir. 2002) 11, 12
United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) 12
United States v. Shelton, 848 F.2d 1485 (10th Cir. 1988) 19
United States v. Silber, 370 U.S. 717 (1962) 10, 11
United States v. Stewart, 157 F. Supp. 2d 572 (E.D.Pa. 2001) 7
United States v. Universal C.I.T. Credit Corp.,
344 U.S. 218 (1952) 15
United States v. Williams, 341 U.S. 58 (1951) 8
U.S.A.A. v. Muir, 792 F.2d 356 (3rd Cir. 1986) 26

Statutes:

15 U.S.C. § 1011-1015 26
18 U.S.C. § 1033 27
18 U.S.C. § 1341 ..... 3, 13
18 U.S.C. § 1343 ..... 3, 13
18 U.S.C. § 1346 5
18 U.S.C. § 1957 3
18 U.S.C. §§ 1961(1) 20
18 U.S.C. § 1962 3
28 U.S.C. § 3231 9
28 U.S.C. § 2255 12

Federal Rule of Appellate Procedure 22(b)(1) 7
Federal Rule of Criminal Procedure 1 10
Federal Rule of Criminal Procedure 12 ..... 9, 10, 11, 13
Federal Rule of Criminal Procedure 33 ..... *passim*
Federal Rule of Criminal Procedure 54 10

OTHER AUTHORITIES:

1 J. Story, Commentaries on Equity Jurisprudence,
§ 195 (10th ed., 1870) 20
Restatement (Second) of Torts, § 537 20
Restatement (Second) of Torts, § 538 20

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

NO. 02-_____

ALLEN W. STEWART, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Allen W. Stewart, respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the opinion and order dated January 13, 2003 affirming the orders of the United States District Court for the Eastern District of Pennsylvania which denied without hearing his motion for new trial pursuant to Federal Rule of Criminal Procedure 33.

OPINIONS BELOW

1. The opinion of the court of appeals dated January 13, 2003 affirming the district court's denial of Petitioner's Rule 33 motion for a new trial based on (a) the Court's post-trial rulings construing the mail and wire fraud statutes as excluding the specific factual conduct charged in the indictment, and (b) newly discovered exculpatory evidence demonstrating his innocence, and its dismissal of related forfeiture and restitution matters (App. 1a-3a) is unpublished.

2. The form order of the court of appeals dated August 29, 2002 denying without explanation Petitioner's request for a certificate of appealability to review the district court's denial of the motion under 28 U.S.C. § 2255 to vacate his conviction and sentence (App. 4a), and the court's order dated November 6, 2002 denying a petition for rehearing or *en banc* reconsideration (App. 5a), referred to in the January 13, 2003 opinion (App. 1a, n.1) are both unreported.

3. The district court's summary order dated June 8, 2001 denying Petitioner's motion for new trial under Rule 33, entered without permitting requested discovery or hearing (App. 10a-11a), is unreported, as is its June 20, 2001 order dismissing related forfeiture and restitution claims (App. 6a-9a).

4. The district court's pretrial opinion and order dated October 23, 1997 denying Petitioner's motion to dismiss the indictment pursuant to F.R.Crim.P. 12(b)(2) for failing to state an offense (App. 12a-19a) is unreported.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1) to grant the requested writ of certiorari and review the January 13, 2003 final order of the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The constitutional and statutory provisions at issue are reproduced in the accompanying Appendix in accordance with Supreme Court Rule 14.1(f) (App. 20a-24a)[1]. The constitutional provisions are from Article III and the Fifth and Sixth Amendments. The statutes include sections of Title 18, U.S.C., concerning insurance fraud (§ 1033), mail fraud (§ 1341), wire fraud (§ 1343), and racketeer influenced and corrupt organizations (§ 1961(1) and 1962(c)); and Federal Rules of Criminal Procedure 12(b)(2) and 33.

---

[1] The statutory provisions reproduced in the Appendix are those in effect at the time of trial or the filing of the subject motion for new trial under Rule 33, as appropriate, for several have subsequently been amended.

STATEMENT OF THE CASE

1. In March 1997, a federal grand jury returned an indictment charging Petitioner, formerly a well-respected insurance law practitioner, with numerous counts of mail and wire fraud. App. 12a. Each count asserted, in nearly identical language, that Petitioner caused a life insurance company owned by his family, Summit National Life Insurance Company ("the Company"), to obtain "directly and indirectly" money and property by fraudulent means. App. 14a. Each scheme defined "property" as state regulatory "licenses and the retention of licenses, premiums from policyholders and customers, dividends, [and] fees." *Id.*

The mailings and wires sent by the Company "for the purpose of executing these schemes"[2] were required state regulatory filings to obtain and retain its licenses to do business. App. 13a. These communications allegedly contained misrepresentations as to the Company's financial condition, thereby deceiving state officials into issuing and renewing state licenses. The indictment claimed this deception constituted mail and wire fraud, because licenses are "property," and obtaining or retaining such "property" enabled the Company to continue its operations and obtain premiums from policyholders while paying dividends and fees. App. 14a.

Based on these purported offenses, the indictment also charged Petitioner with causing illegal monetary transactions in violation of 18 U.S.C. § 1957. App. 12a. It further charged one count under the Racketeer and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(c), citing the mail and wire fraud offenses as predicate acts. App. 13a. Since these counts spanned a period of less than fourteen months, too

---

[2] In relevant part, the mail fraud statute provides that an individual commits the offense if he:

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . *for the purpose of executing such scheme or artifice*. . .[sends or receives a mailing].

18 U.S.C. § 1341 (emphasis added). The wire fraud statute, 18 U.S.C. § 1343, is essentially the same, except a transmittal by wire is required rather than a mailing to execute the scheme to defraud.

brief a period to satisfy RICO's continuity requirement, the indictment also relied upon uncharged, time-barred allegations of mail and wire fraud arising from similar mandated filings sent by the Company between 1988 and 1992.

2. The mail and wire fraud offenses, including the time-barred acts, were all alleged to have arisen as a consequence of the 1988 purchase of the Company, then an Ohio corporation, by interests aligned with Petitioner's family. The indictment claimed that leveraged acquisition, which involved a reinsurance agreement with a Pennsylvania insurer also owned by Petitioner's family, Equitable Beneficial Life Insurance Company ("EBL"), rendered both instantly insolvent under the statutorily mandated accounting policies and procedures ("SAPP") of their respective states of domicile[3]. App. 13a.

Because it was allegedly insolvent, and its filings prepared in accordance with Ohio's SAPP requirements did not disclose a deficit, the indictment charged Petitioner violated the mail and wire fraud statutes by causing the Company to obtain and retain licenses in those jurisdictions receiving such statements. It further claimed that although the charged mailings and wires were not addressed to or ever seen by anyone other than state regulatory officials, the licenses indirectly enabled the Company to illegally collect premiums from policyholders while paying dividends and fees. App. 13a-14a.

3. In 1989, the Company redomesticated to Pennsylvania as part of a planned consolidation with EBL and other interests owned by Petitioner's family. The evidence at trial established that this transfer took place only after receipt of all requisite consents from the Ohio ("OID") and Pennsylvania ("PID") Insurance Departments, an on-site financial audit by the OID, and approval from the Merger Commission constituted under Ohio law to conduct public hearings to ensure policyholders' interests were protected.

After redomestication, the Company and EBL performed successfully from 1989 to 1992 before being sold to a third party with PID approval as part of a divorce settlement. During the more than four years the Company was owned by Petitioner's family, it was audited annually, first in Ohio by Peat Marwick & Main, and later in

---

[3] Each state's SAPP requirements dictate how domestic insurers must prepare their financial statements which are then sent to all jurisdictions in which they are licensed to do business or seek licensure. App. 13a.

Pennsylvania by Price Waterhouse, while also being subjected to extensive on-site examinations by the OID and PID, none of which ever revealed any deficit or insolvency. In 1994, the PID took ownership of the Company and EBL from their new owner after he was unable to execute his ambitious business plan and liquidated them at a substantial loss without notice to or participation by Petitioner.

4. Believing the indictment failed to state an offense, Petitioner filed a pretrial motion to dismiss under Fed.R.Crim.P. 12(b)(2). The motion argued state regulatory licenses do not constitute "property" for purposes of the mail and wire fraud statutes, making the charged conduct noncriminal. It also contended that since neither statute includes the limitless phrase "directly or indirectly," the indictment substantially exceeded the boundaries of common law fraud which Congress utilized in enacting §§ 1341 and 1343. App. 17a-18a.

5. The district court denied the Rule 12(b)(2) motion, holding that: (a) licenses are "property" under *United States v. Martinez*, 905 F.2d 709, 715 (3rd Cir.), *cert. denied*, 498 U.S. 1017 (1990) (App. 16a-17a); (b) the mail and wire fraud statutes should "be construed broadly" (App. 16a); (c) therefore, it was unnecessary for the alleged misrepresentations to be addressed to the party from whom money or property was to be obtained (App. 16a-17a); and (d) even if the licenses were not property, Petitioner's conduct was actionable under 18 U.S.C. § 1346, since false information sent to state agencies had "the effect of depriving the [state] and its citizens of the honest services of its public servants who regulate" insurance companies. App. 17a-18a.

The last part of the court's holding did not survive trial, as the government conceded the indictment failed to charge a §1346 deprivation of "honest services." Although the jury was not instructed on that legal theory, the indictment was neither superseded nor redacted to eliminate the nonstatutory phrase "directly or indirectly." Moreover, the offending language remained unaltered when the court gave each juror a copy of the indictment.

6. During trial, the government moored its case to the evidence given by its putative accounting expert, Wayne Kauth, a retired public accountant. While claiming experience with SAPP, Mr. Kauth conceded to not possessing any particular knowledge of the Ohio or Pennsylvania versions. Nevertheless, over defense objection, he was permitted to testify as an expert based on his personal experience and information made available to him by the government, providing in

most instances the only support for the schemes charged in the indictment.

Throughout his lengthy, well-rehearsed, graphics-supported presentation, Mr. Kauth's essential premise was that the 1988 acquisition rendered the Company insolvent. He further echoed the indictment's allegation the Company's failure to disclose this deficit in later filings with state agencies to obtain and retain state regulatory licenses – the charged mailings and wires – illegally permitted the Company to continue operations while receiving premiums and paying dividends and fees.

Mr. Kauth also testified as to a reinsurance transaction involving the Company's wholly-owned life insurance subsidiary and a third party reinsurer which he alleged was not properly reported to the California Insurance Department ("CID") that had required the transaction pursuant to a change in its reinsurance rules. He claimed, as did CID officials who testified at trial, this illegally enabled the Company to retain its license to do business in California. Importantly, neither Mr. Kauth nor any other government witness claimed the charged mailings or wires were sent to or received or relied upon by anyone other than the state officials to whom such were addressed.

7. Relying on the opinion testimony of Mr. Kauth, for there was no other evidence supporting his major premise, the jury convicted Petitioner of all 135 counts presented for decision[4]. Thereafter, the district court denied all post-trial motions except to dismiss some of the time-barred, uncharged mail fraud predicates while leaving others intact. On appeal, Petitioner argued without success the evidence was insufficient to establish the charged offenses. This Court denied a petition for a writ of certiorari.

8. While this case was on direct appeal, the Court decided *United States v. Neder*, 527 U.S. 1, 22-23 (1999), holding that materiality is an essential element of mail and wire fraud. *Neder* defined "materiality" as a "concealment or misrepresentation [that] has a natural tendency to influence, or was capable of influencing, the

---

[4] Although the court of appeals' opinion claimed Petitioner was convicted of "135 counts of violating" RICO (App. 1a), he actually was convicted of only one such count, the balance being largely mail and wire fraud counts based on the same filing being sent by the Company to some forty jurisdictions in order to obtain and retain state regulatory licenses. App. 13a.

decision of the decisionmaking body *to which it was addressed.*" *Id.* (emphasis added).

9. Less than a year after Petitioner's certiorari petition was denied, the Court held unanimously in *Cleveland v. United States*, 531 U.S. 12 (2000), state regulatory licenses do not constitute "property" under the mail fraud statute. The Court expressly overruled *Martinez*, which the district court had relied upon in denying Petitioner's Rule 12(b)(2) motion to dismiss the indictment. App. 16a-17a.

10. Following Petitioner's conviction, a number of parties commenced discovery in related civil cases which the district court had previously enjoined. The process included depositions of regulatory officials who had previously cooperated with the government but who declined to speak with defense counsel. These depositions yielded material exculpatory and impeachment evidence and revealed that while the government had learned facts prior to trial which would have changed the testimony of key government witnesses, it withheld such from them and did not correct their false testimony given as a consequence.

11. In December 2000, based on *Neder* and *Cleveland*, Petitioner filed a timely § 2255 motion seeking vacatur of his conviction and sentence. Based on the newly discovered exculpatory and impeachment evidence unearthed in civil discovery, he also filed a timely Rule 33 motion seeking a new trial.

12. Refusing Petitioner's requests for discovery or hearing, the trial judge, a former Pennsylvania Insurance Commissioner, denied the § 2255 motion principally on procedural grounds and ignored the new evidence of prosecutorial improprieties. *United States v. Stewart*, 157 F. Supp. 2d 572 (E.D.Pa. 2001). Contrary to Fed.R.App.P. 22(b)(1), his order also denied a COA without explanation.

The following day, June 8, 2001, the court denied Petitioner's Rule 33 motion in a curt two-page memorandum, stating there was no "support for [its] extreme allegations," but without holding a hearing or explaining that perfunctory conclusion. On June 20, 2001, the court dismissed Petitioner's claims regarding irregularities in the management and disposition of forfeited assets by a court-appointed trustee who had been granted an absolute release by the district court over Petitioner's objections. App. 6a-9a.

13. Petitioner filed a timely request for a COA with the court of appeals and lodged direct appeals from the district court's June 8

and June 20, 2001 decisions. These three appeals were consolidated at the government's request. Over a year later, however, the court of appeals summarily denied the requested COA in a form order. App. 4a. Petitioner's request for panel rehearing or *en banc* reconsideration was similarly denied. App. 5a.

After scheduling oral argument on the Rule 33 appeal, the court of appeals reversed that approval on December 16, 2002. On January 13, 2002, the court issued a terse opinion and judgment affirming the district court's rulings. Disregarding the substantial evidence presented in the Rule 33 motion of Petitioner's innocence, including this Court's dispositive rulings in *Cleveland* and *Neder*, the court stated without any analysis the "Rule 33 motion is without a scintilla of factual or legal support [for] the reasons given by [the trial judge] in his succinct opinion and order." App. 2a-3a.

REASONS FOR GRANTING THE WRIT

I.

DISTRICT COURTS SHOULD BE HELD TO LACK SUBJECT MATTER JURISDICTION TO PROCEED TO TRIAL ON THE MERITS WHEN THE FACTUAL CONDUCT CHARGED IN THE INDICTMENT FAILS TO STATE AN OFFENSE.

This past term, *United States v. Cotton*, – U.S. –, 122 S.Ct. 1781 (2002), held an indictment's failure to specify an offense element affecting the defendant's *sentence*, but not his guilt, does not deprive the district court of jurisdiction. To reach that end, *Cotton* overruled *Ex Parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction," while confirming the ruling in *United States v. Williams*, 341 U.S. 58, 66 (1951), a defective indictment "does not affect the jurisdiction of the trial court to determine the case presented by the indictment." *Id.* at 1785.

Cotton left unanswered the important question whether the district court lacks subject matter jurisdiction over an indictment which alleges factual conduct not amounting to an offense, a more fundamental defect than the omission of an offense element relating to punishment. This is a central issue in the case at bar, for while Petitioner argued in a Rule 12(b)(2) motion the indictment failed to

state an offense, he did not pursue that argument on direct appeal due to the court of appeal's contrary holding in *Martinez*. It was not until after Petitioner's conviction became final that *Cleveland* overruled *Martinez* and construed the mail and wire fraud statutes as not encompassing the factual conduct for which Petitioner was convicted. *Id.* at 18, 26.

Although the district court ignored the challenge to its subject matter jurisdiction raised in Petitioner's Rule 33 motion, App. 10a-11a, the court of appeals must have considered but rejected this argument, whether because of *Cotton* or otherwise, for its order states the motion lacked "legal support." App. 3a. Thus, the question is fairly presented whether a district court can be retroactively deprived of subject matter jurisdiction by a subsequent ruling of the Court construing the statute of conviction to exclude the specific factual conduct charged in the indictment. A writ should issue to resolve this jurisdictional question.

A. A District Court Lacks Subject Matter Jurisdiction To Proceed When Decisions Of This Court Preclude The Charged Factual Conduct From Constituting An Offense.

Congress has conferred upon the federal district courts exclusive original jurisdiction over "all offenses against the laws of the United States." 28 U.S.C. § 3231. This "statutory or constitutional power to adjudicate the case," *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998), is derived from Article III of the United States Constitution, which permits federal courts to hear "all cases. . .arising under. . .the laws of the United States." Thus, while Article III and § 3231 empower the district courts to adjudicate criminal cases in the first instance, that authorization is firmly tethered to factual conduct that violates "the laws of the United States." Rule 12(b)(2) recognizes this principle in permitting a defendant to object "at any time during the pendency of the proceedings" the indictment "fails to charge an offense," which if granted would divest the district court of subject matter jurisdiction.

This fundamental rule mirrors the teaching in *United States v. Silber*, 370 U.S. 717 (1962), and *Steel Co.* In *Silber*, the indictment charged factual conduct indistinguishable from that in *Russell v. United States*, 369 U.S. 749 (1962), which had been held not to constitute a

federal offense. Silber, like Petitioner, filed a pretrial Rule 12(b)(2) motion to dismiss which was erroneously denied and had "not presented [that issue] to the Court of Appeals [or] briefed or argued [that issue] in this Court." *Id.* at 499. Nonetheless, the Court noticed the failure to charge an offense and vacated the conviction. *Steel Co.*, a civil case, also made clear "[d]ismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper [because] the claim is 'so insubstantial, implausible, *foreclosed by prior decisions of this Court*, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Id.*, 523 U.S. at 89 (emphasis added) (*quoting Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

A fair reading of *Steel Co.* and *Silber*, both cited in *Cotton*, indicates Rule 12(b)(2) should remain a viable vehicle for challenging subject matter jurisdiction when the indictment alleges factual conduct beyond the boundary of the relevant criminal statute as a matter of statutory construction. This should be no less true when the construes a criminal statute to exclude the charged factual conduct subsequent to conviction, for such rulings are fully retroactive. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n. 12 (1994) (when the Court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date it became law").

A critical remaining question which the Court has not previously addressed is whether the jurisdiction conferred by Rule 33 to seek a new trial can also support a Rule 12(b)(2) objection the indictment failed to charge an offense based on a post-trial ruling of this Court. Rule 12(b)(2)'s explicit language suggests an affirmative answer. It requires "objections shall be noticed by the court at any time during the pendency of the *proceedings*." [Emphasis added]. "Proceedings," as that term is used in the Federal Rules of Criminal Procedure, means "all criminal proceedings" including motions for new trial under Rule 33. *See* Fed.R.Crim.P 1 ("these rules govern the procedure in *all criminal proceedings* in the courts of the United States, as provided in Rule 54(a))" (emphasis added); Fed.R.Crim.P 54(a) ("these rules apply to *all criminal proceedings* . . . in the United States Courts of Appeals") (emphasis added). Since Rule 12(b)(2) does not define "proceeding" differently than Rules 1 and 54, "proceedings" under Rule 12(b)(2) include *all* criminal proceedings, including Rule 33 motions.

Sound policy reasons also support application of Rule 12 to Rule 33 proceedings. The Court indicated in *Silber* that Rule 12 applies to appellate proceedings. As in appellate proceedings, Rule 33 proceedings are a continuation of trial subject to Rule 12, for the court reviews both trial evidence and newly discovered evidence to determine whether the "interests of justice" require a new trial. This inclusive view also finds support in *Davis v. United States*, 417 U.S. 333 (1974), which held that when the Court construes a criminal statute to exclude the factual conduct charged in the indictment, there "can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice" demanding relief. *Id.* at 346-47. *See also Fiore v. White*, 531 U.S. 225 (2001) (one cannot "consistently with the Federal Due Process Clause [be] convicted for conduct that [a] criminal statute, as properly interpreted, does not prohibit")[5].

Cleveland's teaching that mailings made to obtain or retain state regulatory licenses cannot be for "the purpose of executing [a] scheme to defraud" reversed the view of several courts of appeals and has encouraged those wrongly convicted to seek relief. For example, in *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), the petitioner had pled guilty to violating RICO based on mail fraud predicates for making misrepresentations in state liquor license applications. Having served his sentence of incarceration and supervised release, he sought relief via a petition for writ of error. The district court denied the petition, but the Eleventh Circuit reversed, concluding "a district court lacks jurisdiction when an indictment alleges only a non-offense" so that the "resultant conviction and sentence are void from their inception and remain void" thereafter. *Id.* at 715.

---

[5] Although *Davis* and *Fiore* arose in the context of collateral proceedings, the fundamental principle that the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges describe conduct not proscribed by statute is well recognized, for "[t]here are no constructive offenses; and before one can be punished it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926); *see also In Re Winship*, 397 U.S. 358, 364 (1970) (one cannot be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *United States v. Longoria*, 259 F.3d 363, 365 (5th Cir. 2001) ("the grand jury's issuance of an indictment is what gives federal courts jurisdiction to hear a criminal case [making the f]ailure to charge an offense in the indictment a jurisdictional error").

Peter reached its result after observing *Cotton* did not address the situation where the factual conduct alleged in the indictment failed to constitute an offense as a matter of statutory construction. Citing *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), and *United States v. Sanchez*, 269 F.3d 1250, 1275 n. 48 (11th Cir. 2001) (*en banc*), it "distinguished between the claim that a defendant had been charged under a preempted statute [i.e., *Peter*] and the claim that an indictment failed to allege an element of the charged offense [e.g., *Cotton*]." *Id.* at 714. In the former, as in *Peter* and the instant case, the trial court lacked subject matter jurisdiction, for "the Government's proof of the alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would no proof at all [because] the Government affirmatively alleged a specific course of conduct that is outside the reach of the mail fraud statute." *Id.* at 715.

While *Peter*'s reasoning is unquestionably sound, other courts such as the court of appeals here may well read *Cotton* as foreclosing a post-conviction challenge to an indictment whose allegations of factual conduct fail to charge an offense as a matter of subsequent statutory construction unless shoehorned into the restrictive mechanism of 28 U.S.C. § 2255. That would appear to have been the view of the court below, whose summary opinion claims the Rule 33 motion lacks "legal support." App. 3a. This Court's precedents strongly suggest such a restriction on the right of a defendant found guilty of a nonoffense – one actually innocent – to have that void conviction set aside would violate the basic fairness and due process guarantees of the Fifth and Sixth Amendments. *See, e.g., Fiore, supra.* A writ should issue to review this fundamental question.

B. The Court's Post-trial Decisions in *Cleveland* and *Neder* Construed the Mail and Wire Fraud Statutes as Not Encompassing the Specific Factual Conduct Charged.

The mail and wire fraud statutes criminalize mailings and wires which are made "for the purpose of executing" a scheme to defraud that seeks to obtain from the defrauded victim "money or property." The four schemes to defraud in the indictment alleged the "property" sought by the charged mailings and wires was regulatory "licenses and the retention of licenses, and that the money sought was "premiums

from policyholders and customers, dividends [and] fees." App. 13a-14a. Yet, as to the allegations relating to "money," none of the mailings or wires identified in the indictment is claimed to have been sent to, or received, reviewed or relied upon by anyone save the addressee regulatory officials. Moreover, the indictment's use of "directly and indirectly" in charging the fraud offenses, language nowhere found in §§ 1341 and 1343, unquestionably expanded the scope of these statutes beyond the boundaries established by Congress, permitting the grand jury to return an indictment based on a nonoffense.

While the district court denied Petitioner's timely pretrial motion to dismiss the indictment under Rule 12(b)(2), the Court's decisions in *Cleveland* and *Neder* make clear the district court erred. These rulings require all counts of conviction, including the derivative RICO and illegal monetary transaction counts, be set aside because the indictment does not allege criminal factual conduct.

1. The Court's unanimous opinion in *Cleveland* held that state regulatory licenses are not property for purposes of federal fraud statutes.

The Court published *Cleveland* after Petitioner's convictions, holding unanimously: "Section 1341 does not reach fraud in obtaining a state or municipal license. . .for such a license is not 'property' in the government regulator's hands." *Id.* at 20. Concluding that "[e]quating issuance of licenses or permits with a deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities," the Court reasoned that "'unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Id.* at 25 (*quoting Jones v. United States*, 529 U.S. 848, 858 (2000)).

Although this language speaks of "obtaining" a state regulatory license, the word used in § 1341, in fact several of the charged mail fraud counts in *Cleveland* involved mailings to retain or renew licenses. *Id.* at 16. Since the Court reversed the mail fraud counts, not simply mailings to obtain the original license, it clearly intended no distinction between obtaining and retaining a regulatory license.

Accordingly, as each and every mail and wire fraud count for which Petitioner was convicted alleged a state regulatory license was the object of the asserted scheme to defraud, those assertions are inadequate to state an offense and therefore divest the trial court of subject matter jurisdiction.

2. The Court's unanimous opinion in *Neder* recognizing materiality as an element of mail and wire fraud precludes criminal liability for "indirect" consequences of mailings and wires.

Although the text of §§ 1341 and 1343 does not mention materiality, *Neder* observed that of no import, for "[i]t is a well established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under. . .the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (*quoting Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)." *Id.* at 21-22. Moreover, the "well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact. . .the common law could not have conceived of 'fraud' without proof of materiality." *Id.* at 22.

Importantly for present purposes, in rejecting the government's assertion that materiality is not an essential element of mail fraud, *Neder* confirmed that *Durland v. United States*, 161 U.S. 306 (1896), "did not hold, as the Government argues, that the statute encompasses more than common-law fraud." *Id.* at 24. Thus, the core requirement of a material falsehood directed to the intended victim remains a central element of mail and wire fraud.

Here, the indictment alleged Petitioner sought "directly and indirectly" not just "licenses and the retention of licenses" but also "premiums from policyholders and customers, dividends, [and] fees." *Neder* makes clear that allegation fails to state an offense as to money. *Neder* forecloses expansion of the scope of the offense through use of the nonstatutory phrase "directly or indirectly." *Id.* (mail and wire fraud statutes do not "encompass[ ] more than common-law fraud").

Indeed, *Neder*'s core holding that "materiality of falsehood" is an essential element would lose all force if it could be so easily subverted by sweeping into the offenses' net the limitless non-material, "indirect" consequences of a misrepresentation. This inflationary reading of the federal fraud statutes would "arm federal prosecutors with the power to police false statements in an enormous range of submissions to state and local authorities," including the indirect consequences flowing from issuance or renewal of those licenses. *Cleveland*, 531 U.S. at 26. Moreover, millions of state license applications could become fodder for onerous civil litigation brought by those allegedly injured from all sorts of "indirect" causes attributed to some license or permit. In short, not only do the mail and wire fraud statutes contain no mention of "indirect," but if "the sparse legislative history reveals anything, it indicates that the original impetus behind the [statutes] was to protect the people from schemes to deprive them of their money or property," not third parties or those remotely affected. *McNally v. United States*, 483 U.S. 350, 356 (1987).

Further counseling against the indictment's attempted expansion of the statutes is the precept that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). *Cleveland* cites this principle as being "especially appropriate in construing § 1341 because, as this case demonstrates, mail fraud is a predicate offense under RICO. . .and the money laundering statute." *Id.* at 25. When choosing between conflicting views of the statute, the harsher construction should be rejected unless Congress has embraced that reading "in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). *See Scheidler v. Nat. Org. for Women, Inc.*, 537 U.S. –, (2003) (slip op. at 14) ("a significant expansion of the law's coverage must come from Congress, and not from the courts").

Furthermore, for a falsehood to be material, it must have "'a natural tendency to influence, or [capability] of influencing, the decision of the decisionmaking body to which it was addressed.' *United States v. Gaudin*, 515 U.S. 509 (*quoting Kungys v. United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted))." *Neder*, 527 U.S. at 16. Yet, the indictment nowhere claims that any of the charged mailings and wires which purportedly contained misrepresentations as to the Company's financial condition were ever

seen by the premium-paying policyholders and customers allegedly defrauded[6].

As to the indictment's allegation Petitioner violated the mail and wire fraud statutes by causing the Company to pay dividends, fees, and other monies, Justice Scalia aptly recognized in *Schmuck v. United States*, 489 U.S. 705 (1989), the mail fraud statute does not encompass such "indirect" results:

> [The mail fraud statute] does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook. . .In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur – not even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.

Id. at 722-23 (Scalia, J., dissenting). Since all the allegedly material falsehoods originated with the Company, they could hardly have been made in furtherance of a fraud upon itself. Indeed, in a related civil case, *Kaiser v. Stewart*, 1997 WL 476455, *6 (E.D.Pa. 1997), the same district judge as below recognized such a concept was impossible: "Obviously, [the Company] could not have been defrauded to the extent it originated the mailings or wires."

Had Petitioner been indicted for the same factual conduct as charged after *Cleveland* and *Neder*, his indictment would not have survived a Rule 12(b)(2) challenge. The same result should apply even though the indictment predated *Cleveland* and *Neder*, for the Court's construction of criminal statutes is fully retroactive. *Rivers*, *supra*. To ensure the interests of justice are met in this case, a writ should issue.

---

[6] This complete absence of nexus is particularly pertinent here, for the mail and wire fraud statutes reach only "those limited instances in which use of the mails [and wires] is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95 (1944); *see also United States v. Maze*, 414 U.S. 395, 405 (1974) ("Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required the use of the mails be 'for the purpose of executing such scheme. . .'" (footnote omitted).

3. Use of the limitless phrase "directly and indirectly" in Petitioner's indictment produced a result antithetical to *Cleveland*.

In rejecting Petitioner's Rule 12(b)(2) challenge to the indictment, the district court relied principally on *Martinez's* holding that state regulatory licenses were property. Recognizing that could be wrong, as *Cleveland* later confirmed, the court went on to conclude that even if licenses were not property, it was still not required to dismiss the indictment because the "indirect" effects of obtaining and retaining licenses were also actionable:

> The scheme here had the effect of depriving the Commonwealth and its citizens of the honest services of its public servants who regulate insurance companies doing business within its borders. Defendant's strategem was to deceive the Pennsylvania Insurance Department into believing that [the Company] was a healthy insurance company when it was not. Because of defendant's alleged fraud, the Department was prevented from doing its sworn duty to protect the [Company's] policyholders and the insurance buying public generally.

App. 17a.

One need look no further than *Cleveland* to appreciate the flaw in the district court's theory. There, the alleged scheme to obtain and retain video poker licenses deceived the state licensing authority, which "was prevented from doing its sworn duty to protect [customers] and the. . .public generally." App. 17a. Thus, were the district court's ruling below and Petitioner's resultant conviction allowed to stand, *Cleveland*'s holding could be avoided simply by stating in the indictment that the money or property sought was customer wagers. And if that sum was insufficient to invoke money laundering charges or elevate the guideline sentence to the level the prosecutor finds acceptable, he could argue the *Cleveland* truck stop attracted substantially more customers than it could without the licensed machines, thereby generating increased sales from fuel, meals and sundries. Carrying the indirect loss theory a tad further, it would be

possible to claim accidents in the parking lot, late deliveries from vehicles stopping there, and even missed connections all flow from the defective license. This kind of interference in matters historically consigned to the states is precisely what *Cleveland* sought to avoid when noting that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes. *Jones v. United States*, 529 U.S. 848, 858 (2000) (*quoting United States v. Bass*, 404 U.S. 336, 349 (1971)." *Id.* at 25. The district court's bottom line approach should not be permitted to corrupt this demarcation, making necessary the issuance of the requested writ.

II.

THE COURTS OF APPEALS REMAIN DEEPLY DIVIDED OVER WHETHER THE PARTY DECEIVED MUST ALSO BE THE VICTIM TO STATE THE OFFENSE OF MAIL OR WIRE FRAUD.

This Court observed in *McNally* that the "impetus behind the mail fraud statute was to protect the people from schemes to deprive *them* of *their* money." *Id.* at 536 (emphasis added). Many courts of appeals have interpreted this apparent but unstated nexus of deceived and victim to require merger of the two. *Monterrey Plaza Hotel v. Local 483*, 215 F.3d 923, 926 (9th Cir. 2000) ("the mail and wire fraud statutes §§ 1341 and 1343, prohibit use of the mails and wires to *obtain* money or property *from the one who is deceived*") (emphasis in original); *United States v. Guadagna*, 183 F.2d 122, 129-30 (2d Cir. 1999); *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) ("this means not only that a defendant must knowingly make a material misrepresentation or knowingly omit a material fact, but also that the misrepresentation or omission must have the purpose of inducing the victim of the fraud to part with property or undertake some action that he would not otherwise do absent the misrepresentation or omission"); *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) ("intent must be to obtain money or property from the one deceived"); *United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988) ("instructions on the elements of mail fraud must require the jury to find that the victim of the scheme itself must be defrauded of money or property"). This

linkage, a requirement to pleading fraud at common law, as discussed above, is the natural consequence of a fraudulent misrepresentation: "If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property." *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988).

While a majority of the courts of appeals follow this reasoning, others have reached a contrary conclusion. *See United States v. Christopher*, 142 F.3d 46, 53 (1st Cir.), *cert. denied*, 525 U.S. 1054 (1998); *United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir.), *cert. denied*, 522 U.S. 938 (1997); *United States v. Cosentino*, 869 F.2d 301 (7th Cir.), *cert. denied*, 492 U.S. 908 (1989). These cases, largely involving financially challenged, state regulated institutions, find the courts focused not on the misrepresentations but its ultimate effect, and the regulatory agency receiving the misrepresentation is a mere conduit to the ultimate victim. These decisions, however, fail to discuss the restrictive language within the mail and wire fraud statutes, a deficiency in stark contrast to *Cleveland* and *Neder*, which carefully stake out the boundaries of the statutes to avoid entrenching on matters traditionally left to the states.

In the instant case, as discussed in Petitioner's Rule 12(b)(2) motion, none of the mail and wire fraud counts in the indictment allege that the target of the mailing or wiring was *both* a person who was deceived *and* a person from whom Petitioner sought money or property. Thus, under the majority of decisions, the indictment fails to state an offense.

Neder suggests the same result. The holding in *Neder* making "materiality of falsehood" an element of mail and wire fraud adds two important constraints to these statutes, both of which require an identity between deceived and victim. First, *Neder* expressly rejected the argument either statute "encompasses more than common law fraud." *Id.* at 24. Second, it identified "a false statement as material if it has "'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 16.

With regard to the first instruction, *Neder* recognized that at common law, "fraud" required a misrepresentation "of something material, constituting an inducement or motive to the act or omission of the other party" to the offer. *Id.* at 22-23, (*quoting 1 J. Story,*

Commentaries on Equity Jurisprudence, § 195 (10th ed., 1870)). Since a specific act or omission is sought by the misrepresentation, such can only be obtained if the inducement is communicated. Translating that requirement to the mail and wire fraud statute requires the misrepresentation to the party from whom money or property is to be obtained.

The misrepresentations alleged in Petitioner's indictment only went to state agencies to obtain and retain regulatory licenses. Hence, under *Neder*, these communications could be "material" only to the regulatory officials who received them, not others taking subsequent actions. The subsequent actors did not receive the communications and thus were not "induced" to act.

This view gains meaningful support from the Restatement (Second) of Torts, the "most widely accepted distillation" of the common law. *Field v. Mans*, 516 US 59, 70 (1995). There, in section 537, the recipient of a fraudulent misrepresentation may obtain recovery for loss caused by his reliance on the misrepresentation. In other words, actionable fraud requires receipt of the misrepresentation as a condition to relief. Section 538, quoted in *Neder*, confirms as much, defining a matter as "material" if:

> (b) the maker of the misrepresentation knows or has reason to know its recipient regards or is likely to regard the matter as important in determining his choice of action.

The second instruction in *Neder* is in complete accord. It commands the fraudulent misrepresentation be sent to the decisionmaker and be capable of influencing that party's action. *Id.* at 16. Herein, the mailings and wires were addressed to state regulatory officials to obtain and retain licenses. Nowhere does the indictment allege they were received, read or relied upon by anyone but the receiving officials. Accordingly, *Neder* prohibits Petitioner from being found guilty of inducing anyone except state regulatory officials to take action[7].

To resolve the divergence of opinion in the courts of appeals

---

[7] And, of course, *Cleveland* precludes criminal liability for obtaining or retaining Petitioner licenses from state regulatory agencies. Thus, read together, *Cleveland* and *Neder* vitiate Petitioner's entire indictment.

concerning whether the party deceived must also be the victim, and to apply *Neder*'s teachings to this issue, a writ should issue.

III.

A NEW TRIAL IS WARRANTED WHEN THE GOVERNMENT FAILS TO DISCLOSE RELEVANT EXCULPATORY EVIDENCE TO ITS OWN EXPERT WITNESSES, CAUSING THEM TO TESTIFY FALSELY.

This is a case about state insurance law, not the mail and wire fraud, RICO and illegal monetary transaction offenses so prominent in the indictment for which Petitioner was convicted. The indictment cannot be seen otherwise, for the factual conduct it alleges is fraudulent only if such violates state insurance law in the first instance. The lengthy exegesis which introduces the indictment, styled "The Regulatory Environment," proves as much in furnishing a contorted general summary of such laws supportive of the charges proffered against Petitioner, yet making no reference to the specific state laws that control.

This strategy also permeated trial, as the government's focus was rigidly hued to the ultimate result: the Company failed, causing a loss, so someone must be liable, and who better than Petitioner, a then-retired attorney of some means. The government trumpeted this theme in their introductory remarks and summation, using it to excuse inconvenient approvals from state agencies, favorable state examination reports, confirming audits, and complicit due diligence results, claiming all were the product of Petitioner's allegedly privileged position as a senior partner at the law firm of Morgan, Lewis & Bockius. This blunderbuss strategy worked, for Petitioner was convicted of all 135 counts presented to the jury for decision.

Evidence furnished present counsel after Petitioner's conviction became final and the district court lifted its injunction precluding discovery in relation civil actions reveal all too poignantly why the government gave specifics such short shrift. This newly discovered evidence demonstrates the government conducted extensive investigation, including interviews of more than 100 potential witnesses and accumulation of hundreds of thousands of documents. This collection was so extensive the government's putative statutory

accounting expert, Wayne Kauth, testified there were "rooms full" of them that he could not possibly review, requiring him to rely on the prosecution team to provide him materials. CA App. 321.

The government's selective disclosure of those fruits to its own expert hardly satisfies *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. For example, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and *United States v. Bagley*, 473 U.S. 667, 676 (1985), make clear a duty to disclose exculpatory and impeachment evidence exists even if the defense fails to request particular evidence.

A necessary corollary to this production obligation implicit in the government's role as "the spokesman for the Government," *Giglio v. United States*, 405 U.S. 150, 154 (1972), is to ensure any expert it retains or government official it sponsors be afforded fair disclosure of evidence relevant to their proposed testimony. That is especially important in a document-rich case involving the intricacies of state insurance law where it is clear an unguided hand will not assuredly locate all pertinent facts and thus must rely on the government for the relevant documents, as Mr. Kauth's testimony attests.

Because the offenses charged against Petitioner relied on specific factual conduct to support the government's interpretation of state insurance law, it was essential that full disclosure be made to the government's witnesses expressing a view as to whether there was compliance. The jury accords special importance to expert witnesses and government officials when confronted with arcane concepts for which they have no experience upon which to base their judgment. To mislead these witnesses by not providing them all evidence material to their testimony known to the government is basically unfair, for "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible [incomplete knowledge] of the witness [who] testif[ies] falsely that a defendant's life or liberty may depend. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Since the newly discovered evidence unearthed by counsel makes clear not only Mr. Kauth but state insurance department officials provided skewed, if not false, testimony at trial due to the government's failure to make full disclosure, a writ should issue to permit the Court to define the government's disclosure obligations in such circumstances, for "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*,

405 U.S. at 154.

A. The government failed to disclose evidence to its expert that would have defeated his insolvency theory.

The central component of the government's case was the allegation the purchase of the Company was structured to render it and EBL insolvent under SAPP, making the government's subsequent licensure, receipt of premium, and payment of dividends and fees fraudulent. CA App. 58. To support this claim, Mr. Kauth testified a deficit was created when the Company and EBL were combined for accounting purposes and treated as a single entity, an opinion for which he could supply no regulatory basis, as it ignored SAPP values, added costs and liabilities of related entities, and cancelled substantial credits while minimizing stockholder equity.

When confronted during cross-examination with evidence he had ignored several transactions that occurred at the closing which substantially enhanced the surplus of his artificial entity, he conceded their inclusion, apparently unaware of same, but not surprisingly clung to his insolvency conclusion. Asked if he had any knowledge of Ohio's SAPP, he answered no and even failed to identify Ohio's codification. CA App. 327 ("I haven't looked at Ohio statutes for a long time"). Importantly, for present purposes, he also stated he was unaware any workpapers existed from the audit of the Company the OID had performed immediately after the sale, 17 Tr. 160, testifying it was his belief no real examination had been performed.

This of course was untrue. The newly discovered evidence discloses the OID performed a rigorous examination which formed the basis for its decision to accept the transaction and later permitted the redomestication of the Company to Pennsylvania. Prior to trial, government operatives interviewed most of the six OID field examiners who had performed the on-site audit at the Company as well as the senior officials then at OID, including its general counsel. All confirmed that a thorough examination had been performed. Moreover, the on-site examiner-in-charge, CA App. 145-47, 163-67, and his principal assistant, CA App. 172-75, both informed the government agents they found no insolvency, no deficit. This was reiterated by the OID's general counsel in "three, possibly four"

interviews with government agents wherein he advised the Company was solvent, as did the PID, which later expressly approved the Company's transfer from Ohio to Pennsylvania. CA App. 169-171.

Remarkably, none of the exculpatory information gleaned from interviews with OID personnel was produced to the defense. Based on Mr. Kauth's testimony, he, too, was uninformed of those interviews. More to the point, the government disguised this material in the disclosures it did provide. The FBI 302 reports of OID interviews that were furnished nowhere suggest, much less state, the audit team had concluded there was a substantial surplus on the basis of Ohio SAPP. The fact that no reports of the government's multiple interviews with OID general counsel were produced demonstrates the government's troubling lack of candor.

Had the OID exculpatory and impeachment evidence been provided to the government's expert, would his testimony have changed? If so, would he have continued to sponsor his insolvency scenario? The answers are unknown, for the district court refused to authorize discovery or conduct a hearing, yet concluded Petitioner "presented no support for [his] allegations." App. 11a. This view was echoed by an apparently overburdened court of appeals, whose terse opinion claimed "[t]oo much has been written about this case already," App. 1a, and concluded the Rule 33 filing was "without a scintilla of factual or legal support," App. 3a, a difficult assessment to square with the new evidence of government chicanery. There seems little doubt that had the OID evidence been fully disclosed to competent defense counsel it would have materially altered his cross-examination and, critically, the trial strategy employed of not calling OID witnesses in the defense case. Moreover, there is the strong possibility Mr. Kauth's enthusiastic support for his insolvency theory would have been muted.

This Court has yet to address whether the government's withholding of material evidence from its witnesses, particularly its experts, amounts to the "deliberate deception of a court and jurors" *Giglio* found "incompatible with 'rudimentary demands of justice.'" *Id.* at 153 (*quoting Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). This case presents an opportunity to vent that question. A writ should issue, for "[w]hen the 'reliability of a given witness may be determinative of guilt or innocence,' nondisclosure of evidence affecting [his] credibility" weighs heavily on the fairness of the proceeding. *Giglio* at 154 (*quoting Napue* at 269).

B. Federal courts should defer to a state insurance department's interpretation of its own administrative regime.

Discovery in related civil litigation also yielded unquestionable evidence of the government's failure to inform its witnesses concerning the nature of a reinsurance transaction alleged to have defrauded the CID, resulting in the Company retaining its license to do business in California. CA App. 88-95. Ignoring for the present that the alleged scheme could not survive *Cleveland*, the new evidence, a recanting of the trial testimony of the two CID officials who claimed the transaction violated California law, is conclusive of Petitioner's factual innocence. Moreover, since his conviction for this scheme was indisputably linked to the prosecution's failure to disclose facts to the CID witnesses, it provides compelling evidence of the need for this Court to define the government's disclosure obligations to its witnesses lest false testimony given in good faith convict an innocent defendant.

The background of this alleged "scheme to deceive regulators regarding the true and complete reinsurance arrangements involving [the Company and its subsidiary] in order to inflate their financial statements," permitting them to retain their state regulatory licenses to do business in California (CA App. 91), is largely irrelevant. The crux of the matter came down to the question whether a conditional option agreement the Company had entered into with its subsidiary's reinsurer needed to be reported to the CID[8].

At trial, the CID officials, led by the government to believe the option had been exercised, testified the failure to report the agreement

---

[8] In 1992, the CID revised its risk transfer rules applicable to reinsurance and required licensed insurers modify their existing reinsurance agreements as necessary to conform. The Company's life insurance subsidiary was then party to an agreement with a third-party reinsurer which the CID claimed required replacement. A new, acceptable agreement was negotiated with the reinsurer and executed, but because of time constraints the CID imposed, the reinsurer made only a cursory actuarial review. Therefore, as a condition to accepting the new agreement, it obtained from the Company a 30-day option to reopen negotiations if its analysis revealed problems. None being found, the option expired by its own terms without any change in the reinsurance arrangement. The government, however, seized upon the option as undercutting the validity of the new agreement and claimed it made such a nullity.

violated California law and should have precluded the Company and its subsidiary from retaining their California licenses, because the reinsurance failed to meet CID requirements. CA App. 281. Later, however, when these same officials learned in civil depositions the option had not been exercised and no alteration of the reinsurance had been effected, they testified without reservation no disclosure requirement had been violated. Indeed, they acknowledged the Company had properly reported the reinsurance transaction and their trial testimony was in error, thereby exonerating Petitioner, for a state agency's construction of its own regulations "is entitled to great weight and should be disregarded or overturned only for cogent reasons or if such construction is clearly erroneous." *U.S.A.A. v. Muir*, 792 F.2d 356, 362 (3rd Cir. 1986) (*quoting Cohen v. P.U.C.*, 494 A.2d 58, 61 (Pa. Cmwlth. 1985); *see also Cleary v. Waldman*, 167 F.3d 801, 807 (3rd Cir. 1999) ("since the Supreme Court's decision in *Chevron [U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)], courts have deferred to an agency's reasonable interpretation of a statute over which that agency has been granted administrative and law-making authority")[9].

Petitioner's conviction of the nine wire fraud counts that underlie this alleged scheme would not have been possible absent the government's failure to apprise the testifying officials of the true facts. Allowing them to give false testimony based on an incorrect premise

---

[9] The McCarran-Ferguson Act, 15 U.S.C. § 1011-1015, also provides support, for *SEC v. National Securities Inc.*, 393 U.S. 453, 460 (1960), held that "the licensing of companies" is included within the "business of insurance," making that Act applicable to the case at bar. Section 1012(b) of the Act precludes any federal law not specifically relating to the business of insurance, such as the generalized mail and wire fraud statutes, from being construed "to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." Thus, when state insurance department officials determine an action is valid or permitted by its regulatory scheme, such cannot be overturned based on a purportedly conflicting federal statute. In *Humana, Inc. v. Forsyth*, 525 U.S. 229, (1999), the Court concluded as much when construing the phrase "to invalidate, impair, or supersede" as meaning the Act would operate to bar a federal proceeding that sought to "frustrate any declared state policy or interfere with a State's administrative regime." Here, the OID concluded the Company was solvent under Ohio's insurance laws and the CID considered the Company's reinsurance arrangements and disclosures complaint. Those decisions under the Act should not be overridden by a federal court applying a generalized criminal statute.

without correcting such is the evil identified in *Agurs*, which held "that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. That the government relied on this false evidence in its summation, CA App. 332-338, not only to seek conviction on those counts, but to demonstrate a pattern of regulatory violations supportive of its other charges, constitutes misconduct deserving of this Court's attention. Accordingly a writ should issue[10]

---

[10] It is also relevant that in 1994, Congress enacted a new crime of insurance fraud. *See* 18 U.S.C. § 1033. The fact that Congress deemed it necessary to enact a separate statute specifically relating to the business of insurance strongly suggests its recognition the McCarron Ferguson Act's bar precluded resort to the generalized mail and wire fraud statutes in cases such as the one at bar. Petitioner was not charged under § 1033. Significant here, and further indicative of the legislature's views on the scope of proper federal involvement in matters of insurance, is the fact that § 1033 is not included among the RICO predicate offenses specified in 18 U.S.C. § 1961(1). Unfortunately, the expressed will of Congress, as manifest by its omission of insurance fraud from RICO's racketeering predicate offenses, has had little effect on federal prosecutors, as our research has located but a single reported case brought under § 1033. Clearly, the government prefers the pliant mail and wire fraud statutes to the strict requirements of § 1033, while permitting it to charge a RICO violation and realize the extraordinary forfeitures that statute provides, a portion of which recoveries can inure to the prosecutor's office.

CONCLUSION

The admonition of Chief Justice Warren in *Mesarosh v. United States*, 352 U.S. 1 (1956), remains true today:

> [The chief prosecution witness], by his [tainted] testimony, has poisoned the water in the reservoir, and the reservoir cannot be cleaned without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in that regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

Id. at 14. Here, the "earliest opportunity" to cure the injustice perpetrated against Mr. Stewart is for the Court to grant his certiorari petition.

For the reasons stated, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS D. SCHNEIDER
SUITE 1801
1515 Market Street
Philadelphia, Pa 19102
(215) 241-9900

JOSEPH M. FIORAVANTI
Counsel of Record
217 North Monroe St.
Media, Pa 19063
(610) 892-7370

Attorneys for Petitioner
Allen W. Stewart

April 14, 2003

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

C.A. No. 01-2571, 01-2764, 01-2765
United States Court of Appeals for the
Third Circuit
January 13, 2003

Too much has been written about this case already. Hence, we will introduce this opinion by saying only that Appellant, Allen A. Stewart, was convicted of federal mail fraud, wire fraud, and money laundering charges, and 135 counts of violating the Racketeer Influenced and Corrupt Organizations Act, sentenced to 15 years' imprisonment and stripped of his ill-gotten gains, which included his interest in Conestoga Life Assurance Company. The District Court found that Stewart's corporation, Tartan Holdings, Ltd. was an alter ego of Stewart, and dismissed Appellant Tartan's third-party petition claiming an interest in Conestoga. The District Court appointed Appellee Buck and Associates as the trustee to operate and sell Conestoga and other assets that Stewart was ordered to disgorge, and then to distribute the proceeds to Stewart's victims.

Stewart appealed both his conviction and the forfeiture orders. We affirmed. *United States v. Stewart,* 185 F.3d 112 (3d Cir.1999). The appeals now before us are frivolous and amount to no more than a rehash of matters already decided on appeal, and issues which are barred by time limits. Essentially, Stewart and Tartan again challenge Stewart's sentence, reassert an interest in the assets of Conestoga, and seek to activate their claims against Buck and Associates for alleged mismanagement of Conestoga's assets. We will dismiss the appeals filed at Nos. 01-2764 and 01-2765, and affirm the order of the District Court denying Stewart's Rule 33 motion for a new trial, the appeal of which was filed at No. 01-2571[1].

---

[1] As to the appeal on Stewart's 2255 petition, filed at No. 01- 3048, we denied the certificate of appealability on August 29, 2002, and his petition for en banc reconsideration was also denied.

Although styled as an appeal of the District Court's June 20, 2001 order, Stewart and Tartan are attempting to relitigate a number of earlier final orders. These arguments are untimely and cannot be raised on appeal. First, they attempt to raise questions concerning the Judgment and Supplemental Preliminary Order of Forfeiture dated March 26, 1998, which was made final as part of the Judgment and Commitment Order dated August 13, 1998. Second, Stewart and Tartan apparently challenge the Order of Restitution dated August 13, 1998, which was also made part of the Judgment and Commitment Order. These arguments are specious. They cannot re-appeal Stewart's sentence, including the Order of Forfeiture and Order of Restitution, as Stewart has already exhausted his rights of appeal as to those orders. They have already appealed these issues and lost. We will dismiss this appeal as frivolous[2].

Third, Stewart and Tartan appeal the District Court's order of December 7, 2000, granting Buck and Associates' Motion to Discharge and Relea e Trustee, and Authorizing the Sale of Trust Assets. That order was certified as final pursuant to F.R.C.P. 54(b). But, Stewart and Tartan did not appeal it until June 30, 2001. This appeal will likewise be dismissed as untimely.

The fourth order Stewart and Tartan appeal is the order of the District Court dated June 20, 2001, rejecting Stewart and Tartan's claims against the Trustee for alleged mismanagement of the assets. Here, they have no interest in the assets. They simply lack standing to mount a claim against the forfeited assets.

Tangentially, Stewart and Tartan's next claim is that more should have been realized from the sale of the seized assets. For the reasons stated in the foregoing paragraph, this argument, too, is frivolous. Moreover, Stewart is not entitled to receive a credit on his court-ordered restitution for amounts that theoretically could have been obtained from the sale of his ill- gotten gains. Stewart's restitution obligation cannot be offset by amounts that were not actually received by his victims.

---

[2] This appeal is also filed far too late.

Finally, Stewart's contention that the District Court erred by failing to order a new trial on his Rule 33 motion, is without a scintilla of factual or legal support. We decline to say more than simply to refer the parties to the reasons given by Judge Bartle in his succinct opinion and order (attached as Exhibit A to Appellant's brief), rejecting the claim.

In summary, we will dismiss the appeals filed at Nos. 01-2764 and 01- 2765, and affirm the order of the District Court denying Stewart's Rule 33 motion for a new trial, the appeal of which was filed at No. 01-2571.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

C.A. No. 01-3048
United States Court of Appeals for the Third Circuit
August 29, 2002

Present: Sloviter, Rendell, and Fuentes, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
(2) Appellant's memorandum of law in support thereof;
(3) Appellee's memorandum of law in opposition thereto;
(4) Appellant's reply thereto;
(5) Appellant's February 26, 2002 letter pursuant to Federal Rule of Appellate Procedure 28(j);
(6) Appellant's May 10, 2002 letter pursuant to Federal Rule of Appellate Procedure 28(j);
(7) Appellee's May 24, 2002 letter response thereto

in the above-captioned case.

ORDER

The foregoing is denied.

BY THE COURT:

_____
J.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

C.A. No. 01-3048
United States Court of Appeals for the
Third Circuit
November 6, 2002

Present: Becker, Chief Judge, Sloviter, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Ambro, Fuentes, and Smith, Circuit Judges

SUR PETITION FOR REHEARING EN BANC

The Petition for Rehearing filed by Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT:

_____
J.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

Criminal Action No. 96-583
United States District Court for the
Eastern District of Pennsylvania
June 20, 2001

Presently before the court are the claims of defendant Allen Stewart and Tartan Holdings, Ltd. ("Tartan") relating to the criminal forfeiture of Conestoga Life Assurance Company ("Conestoga").

Defendant Allen Stewart was convicted by a jury in December, 1997 of 135 counts of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, as well as federal mail fraud, wire fraud, and money laundering statutes. The jury also determined that certain assets of the defendant were subject to forfeiture under the RICO and money laundering laws. Named among the assets to be forfeited was all stock held by the defendant in Conestoga. Stewart was sentenced to 15 years imprisonment on August 13, 1998 and an order of restitution in the amount of $60.1 million was entered against him. His conviction and sentence were subsequently affirmed by the Court of Appeals. *See United States v. Stewart*, 185 F.3d 112 (3rd Cir. 1999).

On March 26, 1998, this court entered a judgment and supplemental preliminary order of forfeiture as to all stock held by the defendant in Conestoga. This order extinguished the defendant's interest in Conestoga and vested all right, title and interest in the United States of America, subject to the claims of third parties. *See* 18 U.S.C. § 1963(c).

On this same date, at the request of the Government and pursuant

to 18 U.S.C. § 1963(e)[1], we appointed Buck and Associates to serve and act as Trustee of Conestoga on behalf of this Court, to maintain, preserve, and protect the interest of the United States and/or third party claimants and other interested persons in the property and to market it for sale and to operate, manage, preserve, protect and carry on the day-to-day operations of Conestoga.

United States v. Stewart, Crim. A. No. 96-583, Order Appointing Trustee at 2, ¶ 1 (E.D.Pa. Mar. 26, 1998). After the sale and liquidation of Conestoga was accomplished the court signed an order approving the discharge and release of the Trustee on December 7, 2000. The order was in response to the motion to discharge and release Trustee, terminate trust, and authorize certain acts filled by the Trustee of Conestoga, Buck and Associates, and was issued after a hearing was held concerning the operation and sale of Conestoga by the Trustee. We found that the Trustee had at all times acted diligently and properly under what were difficult circumstances.

The order specified that the Trustee would be "fully and finally released and discharged from further responsibility and from any and all civil claims and liabilities in connection with or arising out of the Trust created by the Order of Appointment after completion of the claims process detailed in paragraph 7 herein." *United States v. Stewart*, Crim. A. No. 96-583, Order Granting Trustee's Motion to Discharge and Release Trustee, to Terminate Trust and Authorize Certain Actions to Accomplish the Discharge, Release and Termination

---

[1] The RICO forfeiture statute provides in relevant part:

> Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited.

18 U.S.C. § 1963(c).

at 3, ¶ 2 (E.D.Pa. Dec. 7, 2000) (hereinafter "Discharge Order"). The claims process was as follows:

> Any and all persons or entities with potential claims resulting from any alleged act or omission of the Trustee or Trustee's Representatives in the conduct of Trustee's affairs pursuant to this Court's Order of Appointment shall make such claim in writing to this Court within 90 days of the December 30, 2000 Trust termination date, that is, on or before March 28, 2001. any such claim shall be fully and finally adjudicated before this Court. Any claim not filed within such 90 day period, shall be forever barred. *See SEC v. Black*, 163 F.3d 188, 199 (3rd Cir. 1998); *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). Upon adjudication of claims by this Court, the Trustee and Trustee's Representatives shall be released and expressly absolved from future liability arising from the conduct of Trust affairs pursuant to the Order of Appointment.

Id. at 5, ¶ 7. Notice of the claims process was to be served on all parties who had entered an appearance in the matter, all defendants, and any other known interested persons or entities, as well as published in the *Philadelphia Daily News* for three consecutive weeks. *Id.* at 6, ¶ 9.

On March 27, 2001, the Trustee filed a Certificate of Compliance stating that it had complied with the above notice and publication process. The following day, Stewart and Tartan timely filed their claims. No other claims were filed.

Stewart's claim must be dismissed because he has no standing to assert it. *See United States v. Stewart*, Crim. A. No. 96-583, slip op. at 3-4 (E.D. Pa. Dec. 8, 2000). Any property rights he had in Conestoga "were fully divested at the time this Court ordered Conestoga to be forfeited to the United States." *United States v. Stewart*, Crim. A. No. 96-583, 1999 WL 551891, at *2 (E.D. Pa. June 25, 1999) (citing *United States v. Pelullo*, 178 F.3d 196, 201 (3rd Cir. 1999)). While Stewart recognizes his lack of standing, he asserts a claim to preserve his rights in the event that this Court were to rule favorably on his motions under 28 U.S.C. § 2255 and Rule 33 of the

Federal Rules of Criminal Procedure, pending at the time he filed the claim. We have now denied both motions. *See United States v. Stewart*, Crim. A. No. 96-583, slip op. (E.D.Pa. June 8, 2001); *United States v. Stewart*, Crim. A. No. 96-583, Order (E.D. Pa. June 9, 2001). Thus, Stewart has no standing to assert a claim against the Trustee and his claim will be dismissed.

Tartan's claim suffers from the same deficiency. Previously, Tartan filed a petition for a hearing to adjudicate the validity of its interest in Conestoga. We dismissed the petition because we found that it was clear from the trial record that Stewart created Tartan and treated it as his alter ego. *See United States v. Stewart*, Crim. A. No. 96-583, Order (E.D.Pa. Aug. 10, 1998). Since Stewart has no standing to assert a claim against the Trustee, neither does Tartan. Its claim will be dismissed.

Since no other claims were filed against the Trustee within the 90 day period, we find the Trustee and its representatives have complied with our Discharge Order. We will fully and finally release the Trustee and absolve it from future liability.

Order

AND NOW, this 20th day of June, 2001, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the claim of Allen W. Stewart relating to acts and/or omissions of the Trustee and/or Trustee's representatives in conduct of Trustee's affairs relative to Conestoga Life Assurance Company is DISMISSED;

(2) the claim of Tartan Holdings, Ltd. relating to acts and/or omissions of the Trustee and/or Trustee's representatives in conduct of Trustee's affairs relative to Conestoga Life Assurance Company is DISMISSED;

(3) the Trustee, Buck and Associates, and Trustee's Representatives, INS Consultants, Inc., Rothberger Johnson and Lyons LLP, and White and Williams, LLP, are released and expressly absolved from future liability arising from their conduct of trust affairs pursuant to the March 26, 1998 Order of Appointment.

BY THE COURT:

BARTLE, J.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

Criminal Action No. 96-583
United States District Court for the
Eastern District of Pennsylvania
June 8, 2001

ORDER

AND NOW, this 8th day of June, 2001, it is hereby ORDERED that the motion of defendant Allen W. Stewart seeking a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure is DENIED.

This is defendant Allen W. Stewart's second Rule 33 motion. Rule 33 provides:

> On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. . . .A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty.

Stewart's present motion, filed almost exactly three years after his conviction, is based upon what he contends is "newly discovered evidence." Before a court can order a new trial on the basis of newly discovered evidence, the defendant must meet the following five part test:

> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and

> (e) it must be such and of such nature as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Iannelli, 528 F.2d 1290, 1292 (3rd Cir. 1976); *see United States v. DiSalvo*, 34 F.3d 1204, 1215 (3rd Cir. 1994).

Stewart does not come close to satisfying this test. To begin with, we are not convinced that Stewart's purported "newly discovered evidence" is in fact new. More importantly, Stewart simply cannot demonstrate that the supposed "newly discovered evidence would probably produce an acquittal" in the face of the overwhelming evidence of his guilt presented at trial. *Id.*

Stewart also claims that the government presented false testimony and produced false evidence at trial and that therefore the requirements for granting a new trial under Rule 33 should be relaxed. *See United States v. Meyers*, 484 F.2d 113, 116 (3rd Cir. 1973); *Larrison v. United States*, 24 F.3d 82, 87 (7th Cir. 1928). Stewart has presented no support for these extreme allegations. They are totally without merit.

The interests of justice do not require that Stewart be granted a new trial.

BY THE COURT:

_____

BARTLE, J.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

Criminal Action No. 96-583
Civil Action No. 00-6299
United States District Court for the
Eastern District of Pennsylvania
October 23, 1997
(1997 WL 688815)

This is a criminal action in which defendant Allen Stewart is charged under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The superseding indictment also contains separate counts of mail and wire fraud as well as money laundering and seeks forfeiture of certain assets. Presently before the court is the motion of the defendant to dismiss the superseding indictment for failure to state an indictable offense[1].

In a motion to dismiss an indictment we accept as true the facts alleged and determine if those facts "constitute the violation of law for which [the defendant] is charged." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir.), *cert. denied,* 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 107 (1988); *United States v. Seitz*, 952 F.Supp. 229, 230 n. 1 (E.D.Pa.1997). If the facts do not constitute a violation of federal law, the charges should be dismissed. *Polychron*, 841 F.2d at 834.

The superseding indictment, which consists of 157 counts, charges that defendant committed a pattern of racketeering activity through his association with Summit National Life Insurance Company ("SNLIC"), an insurance company now incorporated in Pennsylvania. Defendant originally purchased SNLIC in 1988, when it was incorporated in Ohio. By acts of wire and mail fraud, he allegedly devised and furthered schemes to siphon millions of dollars out of

---

[1] The original indictment was filed on December 4, 1997. Defendant filed a motion to dismiss the indictment, which we denied in a Memorandum and Order on February 21, 1997. The government filed its superseding indictment on March 12, 1997.

SNLIC as well as Equitable Beneficial Life Insurance Company ("EBL"), another Pennsylvania life insurance company he controlled. Through a series of transactions which inflated the book value of SNLIC's and EBL's assets, he purportedly concealed his theft of funds from the public, insurance regulators, policyholders, customers, potential customers, insurance agents, and others.

Specifically, Count 1 charges defendant with violating § 1962(c) of RICO. Counts 2 through 120 assert that defendant committed mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. The superseding indictment declares in several places that defendant "devised and intended to devise a scheme to defraud and to obtain money and property, directly and indirectly, by means of false and fraudulent pretenses and representations." *See, e.g.*, Superseding Indictment at p. 23, ¶ 3. It describes the various mail and wire fraud schemes created by defendant. It details the mailings and wires, including the places from which they were sent and the persons to whom they were directed. The first scheme, set forth in Counts 2 through 23 involved the removal of valuable assets from SNLIC and EBL. To facilitate this scheme defendant purportedly sent quarterly financial statements to the Pennsylvania Insurance Department, among others. Checks for payment of printing or publication of annual statements were sent to publishing companies, letters were sent to Merrill Lynch seeking the transfer of funds, and wires were even sent to EBL itself[2].

The government also alleges, in Counts 24 through 32, a design to deceive regulators regarding reinsurance. It was advanced through wires sent to the California Department of Insurance and to and from Alabama Reassurance Company. Counts 33 through 120 portray a stratagem to inflate SNLIC's financial statements with an overvalued promissory note from its corporate parent, SNL Corporation. SNLIC financial statements, identifying this inflated asset, were mailed to insurance departments in 43 states, the National Association of Insurance Commissioners, and A.M. Best Company. Several checks

---

[2] Count 2 states that an abstract of an SNLIC annual statement was mailed to Corporation Publication in Nevada.

were also sent to publishing companies to pay for the printing or publication of the SNLIC financial statements.

According to the superseding indictment, the object of these three schemes was to "obtain, directly and indirectly, other money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, legal fees, and an inflated sales price for the companies." Superseding Indictment, at p. 31, ¶ 34. The remainder of the superseding indictment includes allegations that defendant illegally laundered money in violation of 18 U.S.C. § 1957. The final two counts seek forfeiture of money and property obtained as a result of his alleged racketeering and money laundering activity. In his pending motion, defendant asserts various bases for the dismissal of the superseding indictment. Only one of these arguments requires any extended discussion. Defendant contends that, under the mail and wire fraud statutes, an indictment must allege that any deceit or fraud was directed at the party from whom money or property was sought. According to defendant, the superseding indictment is fatally defective because it states that the fraud was directed at the government regulators but does not specify that any money or property was sought or taken from them. Even if the insurance department officials were the only intended victims, defendant's argument is without merit.

The mail fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or takes or receives therefrom, any such matter or thing, ..., shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341[3]. The Supreme Court has explained that the elements of this crime include: "(1) a scheme to defraud, and (2) the mailing of a letter, etc. for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

In *McNally v. United States*, 483 U.S. 350, 358-59, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court held that a defendant's scheme or artifice must have as its purpose to deprive a victim of money or property in order to be convicted under the mail fraud statute. *McNally* involved the prosecution of a Kentucky public official and a private citizen. They had participated in a scheme whereby an insurance agency receiving business from the Commonwealth of Kentucky paid a portion of the commissions the agency received from insurers to another insurance agency in which the official had an interest. *Id.* at 352-54. While the Commonwealth lost no money or property in the scheme, the federal prosecutor claimed that this ploy "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353. However, the Supreme Court concluded that this was too broad a reading of the mail fraud statute and overturned the conviction. *Id.* at 360. It held that a scheme or artifice to defraud must have as its aim the purloining of money or property. *Id.* at 359.

Unhappy with the Supreme Court's decision in *McNally*, Congress enacted 18 U.S.C. § 1346. *See* 134 Cong. Rec. H11108-01, 1988 WL 182261 (Oct. 21, 1988). As a result of this statute, a "'scheme or artifice to defraud' now includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. While other Courts of Appeals have determined that this language is limited to the honest services of government officials, the Third Circuit has not passed upon its scope. *See United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3204 (U.S. Sept. 15, 1997) (No. 97-486); *United States v. Sawyer*, 85 F.3d 713,

---

[3] The wire fraud statute is identical except that the wrongdoer "transmits or causes to be transmitted by means of wire, ... any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343.

724 (1st Cir.1996).

The Third Circuit has made clear, nonetheless, that the mail fraud statute is to be construed broadly. *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 595 (1990). In *Martinez*, the defendant was convicted of mail fraud for his role in obtaining for a co-conspirator a medical license from the Commonwealth of Pennsylvania. *Id.* at 710-11. On appeal he contended that the mail fraud statute required a scheme or artifice to deprive a victim of money or property but that the Commonwealth of Pennsylvania, as the victim, did not suffer any such loss. *Id.* at 713. The Third Circuit rejected this argument. It held that the medical license constituted property within the meaning of the statute. *Id.* at 713-15. It stated:

> *McNally* only requires that the "[g]overnment's interests as property holder" be implicated in order for a scheme to fall within the mail fraud statute ... a license is essentially one manifestation of the government "largess" of the modern state which "is originally public property, comes from the state, and may be withheld completely." ... what the Commonwealth (and derivatively its people) lost was the right to keep its medical licenses to itself and to bestow them on persons who had fairly earned them.

Id. at 714 (citations omitted).

In Pennsylvania as in other states as well, the business of insurance, like the medical profession, is highly regulated. Without state authorization, one cannot open or operate an insurance company anymore than one can open or conduct a medical practice. An insurer in the Commonwealth must obtain a "certificate authorizing the company to commence business." Pa. Stat. Ann. tit. 40, § 405 (West 1992). To maintain its authority to do business, an insurer must remain financially sound. One way for the Insurance Department to determine if an insurer continues to be viable is to review its financial statements, which it is required by law to file. Id. § 443(a)(1). Failure to file can result in fines and a prohibition against writing new business. Id. § 443(e)(1). In addition, the Insurance Commissioner may even "suspend,

revoke or refuse to renew the certificate of authority of any insurer failing to file its annual statement when due." Id. § 443(e)(3)[4].

Implicit, of course, is the duty to submit accurate information. By filing purportedly deceptive financial statements which appeared to show SNLIC as a financially healthy insurer, defendant schemed to retain the certificate authorizing SNLIC to conduct business in Pennsylvania and other states. While the certificate, like the medical license in *Martinez*, may take on value only in the hands of the recipient, it is the property of the Commonwealth nonetheless. *Martinez*, 905 F.2d at 713. If a recipient retains a certificate through fraud and deception, the Commonwealth and its people lose the right to have the certificate returned and to keep it from those who no longer are fairly entitled to it. *Id.* at 714.

Even if the certificate authorizing an insurer to do business is not property, we are still not required to dismiss the superseding indictment. In several places, the superseding indictment makes clear that the defendant "devised and intended to devise a scheme to defraud and to obtain money and property." Superseding Indictment at p. 23, ¶ 3, p. 39, ¶ 12, p. 45, ¶ 3 (emphasis added). Thus, more than an effort to obtain money and property is alleged. Under 18 U.S.C. § 1346, a scheme to defraud is defined to "include[] a scheme or artifice to deprive another of the intangible right of honest services." The scheme here had the effect of depriving the Commonwealth and its citizens of the honest services of its public servants who regulate insurance companies doing business within its borders. Defendant's stratagem was to deceive the Pennsylvania Insurance Department into believing that SNLIC was a healthy insurance company when it was not. Because of defendant's alleged fraud, the Department was prevented from doing its sworn duty to protect the SNLIC policyholders and the insurance buying public generally.

Defendant relies upon *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir.1989), in support of his argument that the mail and

---

[4] The Insurance Commissioner may also require that the insurer file its financial statements with the National Association of Insurance Commissioners. Pa.Stat.Ann. tit. 40, § 443(a)(2) (West Supp.1997).

wire fraud counts are deficient. In that case, the New York Superintendent of Insurance filed a civil RICO action, predicated on acts of mail fraud, against a corporation and its officers. The Superintendent alleged that the defendants absconded with millions of dollars from two insurers, and then hid the theft of such funds. *Id.* at 17. However, *Corcoran* is inapposite here for several reasons. First it was a civil case, applying the law prior to the enactment of 18 U.S.C. § 1346. The Court of Appeals for the Second Circuit held that the superintendent, acting as Liquidator, could not assert claims of mail fraud against defendants who allegedly looted two insurers. *Id.* at 17, 21. The court found that his complaint lacked allegations that he had been deprived of any property interest. *Id.* at 21[5]. Unlike *Corcoran*, the government here alleges that the regulators *were* deprived of a property interest. *Corcoran* seemed to take a much narrower view of property than the Third Circuit set forth in *Martinez*. We are bound by *Martinez*, not *Corcoran*[6].

Several of the defendant's other arguments address concerns that the jury will be confused by the various schemes as set forth in the superseding indictment. If a conviction occurs, he will not know upon which scheme the conviction is based. Defendant also challenges the incorporation of paragraphs and counts into other counts. Our focus on a motion to dismiss the superseding indictment is on whether the defendant himself is appropriately put on notice of the charges against him so that he may prepare his defense. To the extent that any argument concerning jury confusion has merit, it can be addressed at trial through the redaction of the superseding indictment, a detailed verdict sheet, or an explanatory charge.

---

[5] However, the court also found it "unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured." *Corcoran*, 886 F.2d at 20.

[6] To the extent the defendant also seeks dismissal of racketeering act 1 contained in RICO Count 1, his argument is also without merit. Racketeering act 1, entitled a "[s]cheme to conceal the insolvency of [[SNLIC] to permit the defendant to continue to control and operate it," lists multiple acts of mail and wire fraud as its basis. These acts included sending financial statements to insurance departments, mailing checks to publishing companies for payment of printing/publication costs, as well as wiring funds.

Defendant's remaining arguments are without merit and require no discussion. In conclusion, the motion of the defendant to dismiss the superseding indictment will be denied.

ORDER

AND NOW, this 22nd day of October, 1997, for the reasons set forth in the accompany Memorandum, the motion of defendant Allen W. Stewart to dismiss the superseding indictment is DENIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the United States Constitution provides in pertinent part:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States. . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a[n] infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor shall any person. . .be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right. . .to be informed of the nature and cause of the accusation . . . .

18 U.S.C. § 1341, Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 5 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343, Fraud By Wire, Radio, Or Television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 5 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat

involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use

of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

18 U.S.C. § 1962 Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18,

United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Federal Rule of Criminal Procedure 1

(a) These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States

Federal Rule of Criminal Procedure 12(b)

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * * * * *

(2) Defenses and objections based on defects in the indictment or information (other than that if fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)

Federal Rule of Criminal Procedure 33. New Trial

On the defendant's motion, the court may grant a new trial to that defendant if the interest of justice so require. If trial was by the court without a jury, the court may -- on defendant's motion for a new trial -- vacate the judgment, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7- day period.